No. 3465

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

MARY J. DILLON (formerly Mary J. Tynan) and THOMAS B. DILLON,
Plaintiffs in Error,

vs.

NORVENA LINEKER and FREDERICK V. LINEKER,
Defendants in Error.

BRIEF FOR PLAINTIFFS IN ERROR.

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PERNAU-WALSH PRINTING CO.

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I.

Statement.

Mary J. Dillon and Thomas B. Dillon, her husband, prosecute this writ of error to obtain the reversal of a judgment of the District Court for the Northern District of California against them and in favor of Norvena Lineker and Frederick V. Lineker, defendants in error.

The cause was tried by a jury, who returned a verdict against the plaintiffs in error in the sum of $32,000.00 on October 3, 1919; judgment was thereupon entered according to the verdict.

A petition for a new trial was presented by plaintiffs in error and such proceedings were had, that on January 5, 1920, the judgment was modified by reducing it to $28,000.00, and providing that it should be satisfied out of the separate property of the said Mary J. Dillon and the community property of herself and husband. Judgment as so modified was thereupon entered on January 5, 1920.

The case of plaintiffs in error is here presented on the technical "record", without a bill of exceptions, and the assignments of error urged by them are such as appear upon the face of the complaint.

The complaint contains 22 paragraphs. The paragraphs relating to the citizenship and coverture of the parties, present no questions and need not be considered. Certain other paragraphs, i. e., V, VI, VII, X, XI, XIV, XV, XVII and various portions of the remaining paragraphs, relate to matters clearly surplusage in this action at law.

Giving attention to the matters of substance alleged in the complaint, it appears:

That on June 20, 1910, the said Mary J. Dillon was a single woman (then named Mary J. Tynan), and the said Norvena Lineker was a single woman (then named Norvena Svensen). On that date, at the request of the said Mary J. Dillon's son, one William Winter, the said Norvena Lineker borrowed from one Daniel A. McColgan the sum of $2850.00, executed to him her promissory note in said sum and to secure the payment thereof, gave him a trust deed

whereby she conveyed to a trustee for him all her interest in certain real property (Par. XIII, Tr. pp. 6, 7). This real property was in the County of Stanislaus, alleged to be then of the value of $35,000.00, and it appeared that the said Norvena Svensen owned an estate therein, that is to say, the estate remaining after the termination of the life estate in favor of one Ole Svensen, the father of Norvena Svensen, which said life estate did not fall in until the death of said Ole Svensen on August 6, 1916.

That on June 20, 1910, the said Norvena Svensen received $2850.00 in cash from said Daniel A. McColgan, and immediately turned over the said sum to the said William Winter for the use and benefit of Mary J. Dillon, who applied same for her own use in making repairs on her certain real property (Par. XVI, Tr. p. 8).

That on April 22, 1911, the said Daniel A. McColgan demanded of the said Norvena Svensen payment of the said promissory note and told her that if she failed to pay, he would cause her interest in said property to be sold. Thereupon the said Norvena Svensen went to defendant, Mary J. Dillon,

> "and demanded of her that she immediately pay and satisfy said note and interest, and procure the satisfaction and cancellation of said trust deed; and she, the said plaintiff, then and there told said defendant that if she failed to pay and satisfy said note forthwith and cause said trust deed to be satisfied and discharged, she, the said plaintiff, would immediately bring action

against the said defendant, Mary J. Dillon (then Mary J. Tynan) and her son William Winter to recover the amount of said note".

(Par. XVIII, Tr. p. 8.)

Thereupon said Mary J. Dillon requested the said Norvena Svensen not to prosecute any action against her or her son to recover said money borrowed on said note from Daniel A. McColgan and secured by said trust deed; and the said defendant, Mary J. Dillon, then and there agreed with the said Norvena Svensen that if she would refrain from prosecuting any action against her or William Winter, she, the said Mary J. Dillon, would save the said Norvena Svensen

"harmless from any and all loss or damage by reason of the making of said note or said trust deed; and that she, the said defendant Mary J. Dillon, would cause said debt and interest to be paid and discharged and would procure said trust deed to be paid and satisfied, and she, the said defendant Mary J. Dillon, would indemnify and save harmless the said Norvena Lineker (then Norvena Svensen) from any loss or damage whatsoever in connection with said note and trust deed".

(Par. XIX, Tr. p. 9.)

That relying on said promise, the said Norvena Svensen refrained from commencing or bringing or prosecuting any action to recover said money from either Mary J. Dillon or William Winter (Par. XX, Tr. p. 10).

"That thereafter the said Daniel A. McColgan took various proceedings under the said

trust deed, for the purpose of obtaining the money secured thereby, and large expense was incurred in connection therewith; that several adjournments of the sale of said property, under said trust deed, were had from time to time, and further expense thereby incurred; and further expense for attorney's fees, and the like, were incurred by said plaintiff in an endeavor to prevent a sale of said property and a loss thereof to said plaintiff; that thereafter the said Daniel A. McColgan caused said property to be sold under said trust deed, and various other proceedings were had and taken by and on behalf of the said Daniel A. McColgan which resulted in this plaintiff, Norvena Lineker, being deprived of possession of said land and of her interest therein. and of the rents, issues and profits thereof, to her loss and damage in the sum of $35,000.00."

(Par. XXI, Tr. p. 10.)

It is further alleged that defendant, Mary J. Dillon failed and neglected to pay off said indebedness incurred for her use and benefit, and failed and neglected to pay off said note or the interest thereon, or to pay or satisfy the said trust deed, and has failed to hold or save plaintiff harmless from any loss caused to or incurred by plaintiff in connection with the said note and trust deed to her loss and damage in the sum of $35,000.00.

(Par. XXII, Tr. p. 11.)

II.

Specifications of Error Relied Upon.

(Pages 67-70.)

The assignment of errors filed by plaintiffs in error at the time the writ was granted, has been printed in the transcript and appears at length at pages 67 to 70. It is too long to be quoted here; certain propositions are stated in different forms, but they substantially amount to the following propositions which are now urged upon this Court:

(1) The complaint failed to state any facts that would afford any support for any verdict or judgment in the amount rendered, or in any amount in excess of $2850.00 and interest;

(2) The proposition last referred to being established, it results that the Court did not have jurisdiction of the subject matter of the action, for the reason that the amount in controversy exclusive of interest did not exceed the sum of $3000.00; although the complaint contains a positive averment in that behalf, nevertheless, the real facts being stated, it is submitted that the averment must be rejected as surplusage;

(3) The complaint failed to state any cause of action sufficient to justify any judgment against the plaintiff in error, Thomas B. Dillon;

(4) The complaint failed to state any cause of action against any one.

III.

Argument.

1. THE CONTRACT OF MRS. DILLON WAS TO PAY THE McCOLGAN DEBT, WHICH AMOUNTED TO $2850.00 AND INTEREST.

The contract of Mrs. Dillon was not in strictness mere indemnity. It was a positive contract to pay a given debt. The substantial outstanding obligation of Miss Svenson was her note to McColgan for a particular sum of money and interest. The instrument given by her as security was a mere incident. She claimed that money raised by her had been loaned to Mrs. Dillon through her agent. She desired that the transaction be taken care of and she went to Mrs. Dillon with the demand that the *debt* be paid. She did not take a mere indemnity engagement. She desired and obtained more, to wit: the positive agreement of Mrs. Dillon to pay. Had she accepted mere indemnity, she would have been obliged first to pay the debt herself before she could recover it; she could not bring her action until she had paid it, and in her action she would of necessity allege and prove damages. In such an action the defendant's plea at common law would have been *non damnificatus;* defendant would not be under the burden of pleading and showing performance of his contract.

Port v. Jackson, 17 Johns. 239 and 479, in Err.

But being well advised, Miss Svenson exacted the greater obligation; she obtained the definite promise of Mrs. Dillon to pay the debt. Thereupon Miss Svenson obtained a greater advantage; she could have sued Mrs. Dillon to recover the debt without having paid it, she would not be under the obligation of pleading or proving damages. In such case, at common law, the defendant could not plead *non damnificatus,* but was under the burden of pleading and showing performance, to wit: of showing that he paid the debt as agreed.

Port v. Jackson, supra.

If it be said that the contract of Mrs. Dillon here contains promises of different character, the result is, that we must resort to the intention of the parties, to construe the agreement; and from such it is clear that the intention was to contract to pay the debt rather than mere indemnity.

In the Matter of Negus, 7 Wend. 499, 504.

In that case, the Court quoted from the case of Jackson v. Port, supra, and continued its own comment in the following excerpt:

> "The distinction taken by Chancellor Kent, in Jackson v. Port, in Err., 17 Johns. 482, is this:
>
> 'Where a defendant has undertaken to do an act in discharge of the plaintiff from such a bond or covenant, he must show, specially, matter of performance; and this, Jackson ought to have shown in this case; but where the defendant has undertaken to acquit and discharge the plaintiff from any damages, by reason of his

> bond or covenant, he then merely undertakes to indemnify and save harmless, and the plaintiff is then bound to show his damages.' It must be observed that the learned judge speaks of bonds drawn in those different modes, but here the bond contains both modes of expression; the ultimate object of both is indemnification to the plaintiff. Where indemnity alone is expressed, it has always been held that damage must be sustained before a recovery can be had; but where there is a positive agreement to do the act which is to prevent damage to the plaintiff, then an action lies, if the defendant neglects or refuses to do such act; and where the covenant is both to do the act and to indemnify, we must *resort* to the *intention* of the *parties.*''

If we apply the test indicated, in order to construe the contract pleaded here, it is clear that it was the intention of the parties to enter into the greater obligation and not into a mere covenant to indemnify. Thus Mrs. Dillon's obligation was to pay a definite debt; all other promises, if any, were mere incidents of her principal obligation. Any lesser promises would be merged in the greater; the greater covenant would give character to the whole agreement. The McColgan note and trust deed was a single and inseparable obligation. It could not be breached and sued upon in piecemeal. So the agreement of Mrs. Dillon to pay and satisfy the McColgan note and trust deed was a single, inseparable covenant, which if broken once was broken wholly. It could not have been sued upon in piecemeal. Accordingly, when Mrs. Dillon failed to pay the

debt, she breached her contract for all purposes; the measure of damages then became fixed in the amount of the debt. And any damages for the breach of anything promised by her other than her promise to pay her debt, would be merely nominal.

Mrs. Dillon's obligation was to pay the McColgan debt, neither more or less.

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2. MRS. DILLON'S OBLIGATION, IF ANY, WAS TO PAY THE McCOLGAN DEBT WHEN DUE, OR FORTHWITH IN CASE IT WAS ALREADY DUE.

According to the averments of the complaint, no time was specified within which Mrs. Dillon should pay the McColgan note. In the absence of such specification, her agreement may be considered to have been, to pay the McColgan note when due. But there is no averment as to *when* the note became due. For ought that appears it may not have matured up to the time of commencing this action. But assuming, in the absence of averment, that the McColgan debt was due in April, 1911, then Mrs. Dillon's promise, if any, was to pay within a reasonable time, which, under the circumstances would have been forthwith.

The breach of her contract, if any, would have been at that time, and damages estimated under the proper measure of damages, would have become fixed at that time.

Furnas v. Durgin, 119 Mass. 500; 20 Am. Rep. 341.

3. THE MEASURE OF DAMAGES FOR MRS. DILLON'S ALLEGED BREACH OF HER PROMISE, WAS THE AMOUNT OF THE McCOLGAN DEBT, TO WIT: $2850.00 AND INTEREST.

The averments of paragraph XIII of the complaint, shows that on June 20, 1910, Miss Svenson borrowed from Daniel A. McColgan the sum of $2850.00 and executed to him her promissory note in that sum. The amount of interest, if any, is not stated, but if there be any presumption, it would be that the interest was to be annual interest at the rate of 7 per cent per annum. There is nothing in the complaint affording any basis for any claim for there being any other covenant, promise, obligation or agreement, from Svenson to McColgan, than the meager statement in paragraph XIII.

Therefore, it must be taken as conclusive, that it was within the contemplation of the parties that the amount of Mrs. Dillon's obligation, if any, assumed on April 22, 1911, was to pay to McColgan $2850.00, and interest at 7 per cent per annum from June 20, 1910. Such sum constitutes the measure of damages, reasonably or proximately resulting from any breach of the obligation on Mrs. Dillon. Breach of an obligation to pay a mortgage debt, is the amount of the debt.

Turner v. Howze, 28 Cal. App. 167;
Stokes v. Robertson, 85 S. E. 895 (Ga.);
Lathrop v. Atwood, 21 Conn. 117;
Gage v. Lewis, 68 Ill. 604;
Lowe v. Turpie, 44 N. E. 25; 157 Ind. 652;
Furnas v. Durgin, 119 Mass. 500.

4. MISS SVENSEN COULD NOT HAVE RECOVERED A GREATER AMOUNT OF DAMAGES FOR THE BREACH THAN SHE COULD HAVE GAINED BY FULL PERFORMANCE.

Section 3358 Civil Code of Cal.;

Palm v. Planada Dev. Corp., 175 Cal. 771, 773;

Johnson v. Hinkel, 29 Cal. App. 78, 84;

Bates v. Diamond Crystal Salt Co., 55 N. W. 258 (Neb.);

Hickok v. W. E. Adams Co., 99 N. W. 77 (S. D.).

Had the alleged agreement been fully carried out, Mrs. Dillon would have been called upon to pay $2850 and interest, and no more. That was the full amount in money that would have been gained by Miss Svenson upon full performance, if performed according to the contemplation of parties. Yet it is sought now, following a breach of the agreement, to mulct Mrs. Dillon in damages six times as much as she would have been compelled to pay by performance. Plainly, it has been exceedingly advantageous for Miss Svenson to have the contract breached.

The statutory rules of damages set forth in the various sections of the Civil Code are to be deemed limited and circumscribed by the particular provision contained in Section 3358.

Palm v. Planada Dev. Corp., supra.

5. THE MEASURE OF DAMAGES FOR DELAY IN PERFORMANCE IS LIMITED TO INTEREST ON THE MONEY WHICH SHOULD HAVE BEEN PAID.

The measure of damages for which Mrs. Dillon became liable by the breach of her promise to pay the McColgan note, being shown to be the amount of the note with interest, that sum became fixed as early as 1911. The sum so fixed cannot be deemed to have become enhanced by circumstances happening thereafter, such as loss of property by forced sale, inability to undertake other enterprises, inability to carry out other contracts, or anything of that nature. The damages incurred by delay in paying the note is conclusively deemed to be interest on the amount of the note.

Loudon v. Taxing Dist. etc., 104 U. S. 771;
New Orleans Ins. Ass'n. v. Piaggio, 83 U. S. (16 Wall.) 378; 21 L. ed. 358;
Savings Bank of S. Cal. v. Asbury, 117 Cal. 96;
Guy v. Franklin, 5 Cal. 416.

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6. THE MEASURE OF DAMAGES FOR THE BREACH OF AN AGREEMENT TO PAY, DISCHARGE, REMOVE, INDEMNIFY OR SAVE HARMLESS FROM A LIEN UPON REAL ESTATE, IS THE AMOUNT OF THE LIEN AND NOT THE VALUE OF THE REAL ESTATE.

As alleged in the complaint, the promise of Mrs. Dillon in respect of the McColgan debt was stated in various phrases. In connection with the note

and debt, certain references were made to a trust deed which Mrs. Dillon was to satisfy, to indemnify or to save harmless, etc. But the case is not altered from a consideration of these incidental features of the promise alleged, for the reason that no damages could proximately result to Miss Svensen over and above the amount of the McColgan debt.

As we have shown in our argument in Section I, above, the intention of the parties is deemed to govern in construing the contract, and that the transaction so construed amounts, in sum, to the promise of Mrs. Dillon to pay the McColgan debt. The measure of damages for a breach of a promise of that character is, as we have shown, the amount of the debt. The damages to proximately result from a breach could have no essential relation to the value of the encumbered real estate; they would be fixed with reference to the amount of the debt to be paid.

If the case was that the promise was not to pay the debt, but to "indemnify" or "save harmless" from the encumbrance, or in other words, if the promise was unmixed *indemnity* rather than of *payment,* still the measure of damages for the breach would be referred rather to the amount of the encumbrance than to the value of the encumbered real estate. In other words, the measure of damages for failure to remove an encumbrance or for a breach of a covenant against an encumbrance, would be the amount of the encumbrance and not the value of the encumbered estate which may have

been sold, unless the value of the estate be less than the encumbrance, in which event such value would measure the damages.

This has been so ruled in the well considered Massachusetts case of

Furnas v. Durgin, 119 Mass. 500,

wherein the Court said:

> "It has been held, however, in favor of the covenantor, that when the mortgage is less than the value of the land, and it would be plainly for the interest of the holder of the equity of redemption to redeem, the covenantee on such eviction shall recover only the amount of the mortgage, with interest, and not the full value of the estate."

In the case of

White v. Whitney, 3 Metc. (44 Mass.) 86, 89,

the Court held:

> "Where land, that is subject to a mortgage, is conveyed with a covenant of warranty, and the grantee is ousted by the mortgagee, the rule of damages, upon a suit on the covenant, is the value of the estate at the time of the ouster, unless that value exceeds the amount due on the mortgage; but if it exceed that amount, then that amount is the measure of damages."

When an agreement is made to indemnify against, or to advance money to remove, an encumbrance upon real estate, the measure of damages for the breach cannot exceed the encumbrance. It may be less than the lien in the event that the value of the real estate sold thereunder is less than the lien but it cannot be greater. Any loss to the land owner

which represents the excess in value of the land sold over the amount of encumbrance, is not the proximate result of the breach of the agreement.

This principle has been established in the following well considered cases:

Lowe v. Turpie, 44 N. E. 25; 147 Ind. 652; 37 L. R. A. 233;
White v.Whitney, 3 Metc. (44 Mass.) 86, 89;
Tufts v. Adams, 8 Pick. (24 Mass.) 547;
Blood v. Wilkins, 43 Iowa 567;
Furnas v. Durgin, 119 Mass. 500.

The case of Lowe v. Turpie, supra, is a very instructive case, in which the Supreme Court of Indiana, in reversing the decision of the lower Court, applied the rule of damages herein contended for. It appeared that for a consideration, Lowe had contracted to advance money to remove certain liens from real estate owned by the Turpies; that the Turpies were to reimburse Lowe for a portion but not all of the moneys so advanced. The real estate was conveyed to Lowe as security. He failed to take care of the liens whereupon the land was sold to satisfy the liens, and thereby lost to the Turpies. They sought damages for a breach of the contract to advance money to remove the liens, and claimed the value of the land so lost which the lower Court saw fit to allow. This the Supreme Court held to be the application of an erroneous measure of damages; that nothing more than nominal damages could have accrued to the Turpies for the breach of Lowe's contract.

In the course of its opinion, the Court said:

"It is clear, we think, that the measure of damages for the breach by appellant of his agreement to advance money to pay liens, etc., set forth in the finding, is the same as for breach of a contract to loan money direct. This Court also held in that case that the complaint, so far as it rested upon the agreement of this appellant to advance money, and the deeds to secure the same, only made a case for nominal damages, as no special damages were shown." * * *

"It is the rule, settled beyond controversy, that the damages to be recovered must be the natural and proximate consequences of the breach of the contract. Damages which are remote or speculative cannot be recovered." * * *

"When one is indebted to another, and fails to pay the same when due, the damages for the delay in payment are provided for in the allowance of interest. This is the measure of damages adopted by the law in all actions by the creditor against his debtor." * * *

"Appellees admit the measure of damages for the failure of a debtor to pay money when due to be as stated, but insist that when the obligation to pay money is special, and has reference to other objects than the mere discharge of debts,—as in this case, to advance or loan money to pay taxes and discharge liens,—damages beyond interest for delay of payment, according to the actual injury, may be recovered; citing 1 Sutherland, Damages, p. 164, sec. 77, where the rule stated by appellees is approved. The author, however, in the same section, says: 'Where one person furnishes money to another to discharge an encumbrance upon the land of the person furnishing the money, and the person undertaking to dis-

charge the encumbrance neglects to do it, and the land is lost to the owner by reason of the encumbrance, the measure of damages may be the money furnished, with the interest, or the value of the land lost, according to circumstances. If the landowner has knowledge of the agent's failure in *time* to *redeem* the *land himself,* his damages will be the *money furnished with interest.* But if the landowner justly relies upon his agent to whom he has furnished money to discharge the encumbrance, and the land is lost without his knowledge and solely through the fault of the agent, the latter will be liable for the value of the land at the time it was lost.' * * *

"We think the rule concerning the measure of damages in cases where one person furnishes the money to another to discharge liens on the land of the one furnishing the money is correctly stated in Blood v. Wilkins, 43 Iowa 567. In an action for breach of a contract to loan money to pay liens or encumbrances, no more than nominal damages can be recovered unless the facts showing special damages are alleged and proved." * * *

"*In contemplation of law, money is always in the market, and procurable at the lawful rate of interest.* And if the owner of real estate, who has a contract with another to loan him money to pay liens or encumbrances on his land, who refuses to do so, had knowledge of such refusal in time to give him an opportunity to seek for it elsewhere, the fact that he cannot procure the money, on account of being in embarrassed circumstances, will *not entitle him to recover more than nominal damages;* for the reason that no party's conditions, in respect to the measure of damages, is any worse, for having failed in his engagement to a person whose affairs are embarrassed, than if the same result

had occurred with one in prosperous or affluent circumstances." (Citing cases.) * * *

"In Mayhew v. Burns, 103 Ind. 338, 342, this Court, by Mitchell, J., said:

" 'The law does not set up one standard by which to determine the rights or measure the conduct of the rich, and another for the poor. Its protecting shield is extended alike over all. Its pride and glory are to mete out equal and exact justice to all, in the same scale, rich and poor alike. In this all find security and protection.' It follows, therefore, that upon the facts found the Turpies were not entitled to more than nominal damages for the breach by appellant of his contract to loan money to pay liens and encumbrances."

In the case of Blood v. Wilkins, supra, the same rule of damages was applied. There a landowner had deposited money with an agent to discharge encumbrances on his land. The agent failed to do so and the land was lost by reason of an encumbrance. And it was said:

"If the landowner has knowledge of the agent's failure in *time* to *redeem* the *land himself,* his damages will be the *money furnished with interest.* But if the landowner justly relies upon his agent to whom he has furnished money to discharge the encumbrance and the land is lost without his knowledge and solely through the fault of the agent, then the latter will be liable for the value of the land at the time it is lost."

Here the complaint contains no allegation of any special duty resting upon Mrs. Dillon by virtue of her being an agent or trustee of Svensen. It con-

tains no allegation that Svensen was surprised or did not have ample time to obtain the money elsewhere upon the security of her real estate. It contains no suggestion of any fact tending to show why it was necessary to allow property worth ten times the value, to be sacrificed for a mere $2850.00 debt. In no just sense can a larger loss be said proximately to result from the failure of Mrs. Dillon to pay the $2850.00; nor can it be justly said that it was within the contemplation of the parties that Mrs. Dillon would become liable for such a large amount of damages for her failure to pay the note or for any sum in excess of the note and interest.

Any alleged damage claimed to flow from the breach of Mrs. Dillon's contract, outside of her failure to pay the McColgan debt, cannot be more than nominal.

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7. THE COMPLAINT DOES NOT SHOW SPECIAL DAMAGES.

If it be taken that the complaint shows that Svensen suffered damages in the amount of the McColgan debt, it is quite clear that it does not show any item of special damages. It does not show the amount of any alleged expenses paid, or of any counsel fees, or of any cost of publication.

The complaint is quite meager in its references to the trust deed or as to what was done thereunder; it does not incorporate a copy of the alleged trust

deed; it does not set forth any of its terms or provisions. It merely contains the bare statement that, "to secure the payment thereof" (the McColgan note), Svensen executed "a trust deed whereby she conveyed all her interest in said real property to one R. McColgan as trustee for the said D. A. McColgan". No other provision of the trust deed was pleaded. It does not appear that any provision was made for expenses or counsel fees.

Any estate in Svensen other than what would be necessary to the execution of the trust, was left in her (Sec. 866 C. C.). Therefore, if the property was sold at its value—and it is not alleged that it was not—the surplus over the McColgan debt would be paid to her. The amount for which the real property was sold is not alleged.

The value of Svensen's estate in the real property does not appear. It is alleged the real estate was worth $35,000.00, but Svensen had only a remainder therein after the termination of a life estate; the value of her estate is not stated.

If we were to assume that Mrs. Dillon would be responsible for the act of McColgan in causing the property to be sold under the trust deed, there is no warrant for charging her with a responsibility for other proceedings taken by McColgan, which may have resulted in loss to Svensen. When regard is had to the allegation of the complaint, it appears that "thereafter" McColgan caused the said property to be sold under the trust deed. But the

further allegation that "various other proceedings were had and taken by" McColgan which resulted in plaintiff's loss, adds nothing to the complaint. As to the latter proceedings it is sufficient to point out that Mrs. Dillon was not responsible for them. It is not shown what they were; they are not shown to have been under the terms of the trust deed; it is not shown that they had any relation to the trust deed. In no event would responsibility for alleged damage from such "other proceedings" be embraced within Mrs. Dillon's promise.

Mrs. Dillon is not responsible for McColgan's acts, which have no relation to the trust deed and may even have been wrongful.

Vicars v. Wilcocks, 8 East 1; 103 Reprint 245;

State v. Ward, 9 Heisk. 100 (Tenn.);

Nirdlinger v. American Dist. Tel. Co., 245 Pa. 453; 91 A. 883;

Cuff v. Newark, etc., R. Co., 35 N. J. L. 17; 10 Am. R. 205;

Shugart v. Egan, 83 Ill. 56; 25 Am. R. 359.

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8. IT THUS APPEARS FROM THE RECORD THAT APPLYING THE LEGAL RULE OF DAMAGES FLOWING FROM THE FACTS PLEADED, THE VERDICT AND JUDGMENT ARE EXCESSIVE TO A LARGE AMOUNT, AND PLAINTIFFS IN ERROR ARE ENTITLED TO BE RELIEVED FROM THE JUDGMENT AWARDING SUCH EXCESS.

We have shown, that if all the facts alleged in the complaint were true, the total amount of damages

that could accrue would be the amount of the McColgan debt and interest. Therefore, the judgment and verdict are in excess to a large amount. These facts appear from the record. The plaintiffs in error are entitled on this writ of error to have relief from such excessive verdict and judgment.

New Orleans Ins. Ass'n. v. Piaggio, 83 U. S. 378; 21 L. ed. 358;

World's Columbian Exposition v. Republic, 91 Fed. 64, 76;

Vance v. W. A. Vandercook Co., 170 U. S. 468; 42 L. ed. 1111.

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9. SUCH BEING THE TRUE MEASURE OF DAMAGES IN THE CASE AT BAR, IT RESULTS THAT THE DISTRICT COURT DID NOT HAVE JURISDICTION.

From the facts stated in the complaint, it follows as a matter of law, that the true measure of damages was the amount of the McColgan debt, to wit: $2850.00 and interest. It is thus shown that the real amount in controversy was less than $3000.00, exclusive of interest and costs. Accordingly, the true amount in controversy was not sufficient to confer jurisdiction upon a Federal Court. It is true that the plaintiff in the original action claimed more than $3000.00; and it is also true that the complaint contains the general averment that the amount in controversy exclusive of interest exceeds $3000.00. But it has been held that when upon the face of plain-

tiffs own pleadings it is not legally possible for him to recover the jurisdictional amount, a Federal Court has not jurisdiction, regardless of the amount for which the plaintiff prays judgment.

Vance v. W. A. Vandercook Co., 170 U. S. 468; 42 L. ed. 1111.

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10. IN NO EVENT IS PLAINTIFF IN ERROR, THOMAS B. DILLON, LIABLE ON THE AGREEMENT BETWEEN MRS. DILLON AND SVENSEN; JUDGMENT SHOULD NOT RUN AGAINST HIM.

It is unquestioned that the agreement herein sued upon was made, if at all, by Mrs. Dillon alone several years prior to her marriage with Thomas B. Dillon. He had nothing whatever to do with the contract, yet the judgment runs against him for the amount of $28,000.00, in the same way as it does against Mrs. Dillon. Such a *liability* is *against* him *personally*. It is true that on motion for a new trial it was modified so as not to affect his separate property. But this affords little practical relief. He still remains *bound personally,* although he had nothing whatever to do with the contract sued upon. The judgment, if otherwise proper, should be enforcible solely out of any separate property belonging to Mrs. Dillon.

Blessing v. Feder, 28 Cal. App. Dec. 754 (hearing by Supreme Court denied May 26, 1919);

Bogart v. Woodruff, 96 Cal. 609, 612.

II. THE COMPLAINT FAILS TO STATE A CAUSE OF ACTION AGAINST ANY ONE IN ANY AMOUNT.

(a) It was incumbent upon the pleader to state the consideration for the promise.

Acheson v. Western U. Tel. Co., 96 Cal. 641, 644.

(b) The complaint fails to show any legal or valid consideration for Mrs. Dillon's alleged promise; it fails to allege that Svensen promised or agreed to anything; or promised or agreed to refrain from bringing the threatened action against Mrs. Dillon; no agreement on the part of Svensen not to sue was alleged. Mere forbearance to sue does not constitute a good consideration.

Shadburne v. Daly, 76 Cal. 355;
Estate of Thomson, 165 Cal. 290;
Blumenthal v. Tibbits, 66 N. E. 159 (160 Ind. 70);
Williams v. Hasshagen, 166 Cal. 386, 390.

CONCLUSION.

As we have shown above, sufficient facts appear from the record to show that a manifest injustice has been done to Mrs. Dillon in this case. Reading the meager allegations of the complaint, sufficient appears to shock the moral sense of any impartial man when the result is considered. We see the entire fortune of Mrs. Dillon in the sum of $28,000.00 taken from her in October, 1919, upon an alleged

promise, resting in mere parol, to pay a given debt of $2850.00, which promise is said to have been made eight years before. An Appellate Court knowing how business is ordinarily conducted, and skilled in the application of law to fact may well be puzzled from the meager averments of the complaint as to how such a result should have followed the initial transaction.

There is no bill of exceptions in the record which the Court might read to learn what transpired at the trial. Owing to the not unpardonable belief of former counsel for plaintiffs in error that the state practice governed in that behalf, no exceptions were taken on questions of law as to evidence raised at the trial. But a study of the record has convinced us that sufficient evidence appears from the record before this Court to enable justice to be done.

The judgment should be reversed.

Dated, San Francisco,
May 5, 1920.

Respectfully submitted,

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